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No. _____

In The
Supreme Court of the United States

Patricia L. Larsen and Donald Larsen,
Petitioners,

v.

Mayo Foundation, Mayo Clinic,
and Mayo Medical Center,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was service of process timely under Fed.R.Civ.P 3 and 4(m)?

2. Is Fed.R.Civ.P.4 to be liberally construed when a defendant receives timely notice of suit?

3. Was service of process proper and timely under Minn.R.Civ.P. 4.05?

PARTIES TO THE PROCEEDINGS

Petitioners

Patricia L. Larsen and Donald Larsen. Petitioners are individuals and have no corporate affiliations.

Respondents

Mayo Medical Center, The Mayo Foundation, and Mayo Clinic.

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The opinion of the United States Court of Appeals for the Eighth Circuit in *Patricia L. Larsen and Donald Larsen v. Mayo Medical Center, The Mayo Foundation and Mayo Clinic* (8th Cir. 7-14-00), is set forth in the Appendix A at 1a.

The Memorandum Opinion and Order of the District Court for the District of Minnesota in *Patricia L. Larsen and Donald Larsen vs. Mayo Foundation, Mayo Clinic and Mayo Medical Center,* filed August 12, 1999. Appendix B at 11a.

BASIS FOR JURISDICTION

The final Judgment of the United States Court of Appeals for the Eighth Circuit affirming the decision of the District Court for the District of Minnesota was entered July 14, 2000. Appendix A. This Petition for Writ of Certiorari is filed within ninety (90) days from that date. 28 U.S.C. Section 2101(c).

The jurisdiction of this court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RULES OF CIVIL PROCEDURE INVOLVED

Fed.R.Civ.P.3 - Commencement of Action - A civil action is commenced by filing a complaint with the court.

Fed.R.Civ.P.4 - Summons - (d) Waiver of Service - Duty to Save Costs of Service; Request to Waive

(2) An individual, corporation or association that is subject to service under subdivision (e), (f),

or (h) and that receives notice of an action in the manner provided in this paragraph has a duty to avoid unnecessary costs of serving the summons. To avoid costs, the plaintiff may notify such a defendant of the commencement of the action and request that the defendant waive service of a summons. The notice and request

(A) shall be in writing and shall be addressed directly to the defendant, if an individual, or else to an officer or managing or general agent (or other agent authorized by appointment or law to receive service of process) of a defendant subject to service under subdivision (h);

(B) shall be dispatched through first-class mail or other reliable means;

(C) shall be accompanied by a copy of the complaint and shall identify the court in which it has been filed;

(D) shall inform the defendant, by means of a text prescribed in an official form promulgated pursuant to Rule 84, of the consequences of compliance of a failure to comply with the request;

(E) shall set forth the date on which the request is sent;

(F) shall allow the defendant a reasonable time to return the waiver, which shall be at least 30 days from the date on which the request is sent or 60 days from that date if the defendant is addressed outside any judicial district of the United States; and

(G) shall provide the defendant with an extra copy of the notice and request, as well as a prepaid means of compliance in writing.

Minn. R.Civ.P.3 - Commencement of the Action; Service of the Complaint.

Minn.R.Civ.P.3.01 - A civil action is commenced against each defendant:

(a) when the summons is served upon that defendant;

Minn. R.Civ.P.4.03 - Personal Service - Service of summons within the state shall be as follows:

(c) Upon a Corporation. Upon a domestic or foreign corporation, by delivering a copy to an officer or managing agent, or to any other agent authorized expressly or impliedly or designated by statute to receive service of summons, and if the agent is one authorized or designated under statute to receive service any statutory provision for the manner of such service shall be complied with . . .

STATEMENT OF THE CASE

This is a medical malpractice action against the Mayo Clinic alleging that the Mayo Clinic was negligent in improperly prescribing the antibiotic Gentamicin for treatment of plaintiff Patricia L. Larsen's endocarditis.

The defendant moved for summary judgment, asserting that the action was not timely and commenced outside of Minnesota's two-year statute of limitations. The trial court granted defendants' motion for summary judgment and dismissed plaintiffs' Amended Complaint With Prejudice. The plaintiffs appealed to the Eighth Circuit Court of Appeals. The Eighth Circuit Court of Appeals affirmed the District Court's decision to grant summary judgment.

The facts are not in dispute between the parties as the facts relate to the dates of Patricia Larsen's hospitalization and treatment with the drug Gentamicin.

In June of 1996, after experiencing various symptoms, including pain in her left heel, weakness and achiness in her right arm, and night sweats and chills for several months, Mrs. Larsen sought treatment from Mayo. Mrs. Larsen was hospitalized at St. Mary's Hospital of the Mayo Clinic on June 27, 1996.

Patricia Larsen was diagnosed as suffering from bacterial endocarditis. Mayo prescribed Gentamicin, an antibiotic. The drug was administered intravenously during Mrs. Larsen's hospitalization, from June 27, 1996, through July 6, 1996, the date of discharge from Mayo. After Mrs. Larsen's discharge, Mayo prescribed 500 milligrams of Gentamicin to be administered daily. July 13, 1996 was the last date for which Mayo prescribed Gentamicin for Mrs. Larsen.

On July 19, 1996, Mrs. Larsen returned to St. Mary's Hospital of the Mayo Clinic, after suffering dizziness and nausea for four days. Mrs. Larsen was hospitalized and diagnosed with Gentamicin vestibular ototoxicity, a condition affecting Mrs. Larsen's ability to maintain her balance.

According to the Hospital Notes for July 19, 1996, a person from Mayo "[d]iscussed frankly" with Mrs. Larsen that "she may not completely recover function," but that hopefully her body would compensate for the lost function and her balance would improve. In addition, according to the Rehabilitation Record dated July 23, 1996, a person from Mayo had a "long discussion [with Patricia Larsen and Donald Larsen] as to what has happened, what they can expect, and what [vestibular rehabilitation] has to offer." Larsens claim the prescribed dose of Gentamicin was excessive and resulted in the ototoxicity and vestibular damage.

Mrs. Larsen was discharged from Mayo on July 24, 1996. She returned to Mayo on September 5, 1996 and September 13, 1996 for follow-up treatment of bacterial endocarditis and vestibular ototoxicity.

On May 29, 1998, the plaintiffs filed the present action. (Fed.R.Civ.P 3). On June 1, 1998, the plaintiffs mailed a copy of the Summons and Complaint to Mayo. Defendants signed a certified mail return postal receipt on June 3, 1998 for the original Summons and Complaint. The plaintiffs enclosed an Acknowledgment of Service form for the defendants' execution. The defendants chose not to sign and return the acknowledgment form. On June 15, 1998, in-house counsel for Mayo spoke with plaintiffs' counsel by telephone. Counsel for Mayo informed plaintiffs' counsel that Mayo was not going to admit service and that counsel for Mayo was not going to assist the plaintiffs in suing Mayo in any way.

On the 3rd day of June, 1998, or within a day or two thereafter, Trudi Trysla, attorney at law, Legal Department, Mayo Clinic, Rochester, Minnesota, had in her actual or constructive possession a copy of the original Summons and

Complaint filed with the Clerk of the United States District Court, St. Paul, Minnesota. The filing date was May 28, 1998.

On or about the 15th day of June, 1998, Trudi Trysla informed Kenneth F. Johannson, attorney for the plaintiffs, during a telephone conference, that she would not disclose nor reveal the true corporate identity of the Mayo Medical Center; that she would not assist Mr. Johannson in suing her client; that she further informed Mr. Johannson that she would not waive service of process

On or about the 24th day of June, 1998, or within a day or two thereafter, Trudi Trysla had in her actual or constructive possession a copy of the Amended Summons and Complaint which was filed with the Clerk of the United States District Court, St. Paul, Minnesota, on the 19th day of June, 1998

It is undisputed that Trudi Trysla is an agent duly appointed or designated by the Mayo Foundation for Education and Research for the purpose of receiving service of process

On June 22, 1998, the plaintiffs filed their Amended Complaint. In June of 1998, Mayo received the Amended Summons and Complaint from the plaintiffs by mail, again with an Acknowledgment of Service form enclosed for the defendants' execution. Defendants signed a certified mail return postal receipt on June 24, 1998 for the Amended Summons and Complaint. The defendants again chose not to sign and return the acknowledgment form. On September 3, 1998, counsel for the plaintiffs called in-house counsel for Mayo. In returning the call, in-house counsel for Mayo spoke with plaintiffs' counsel's assistant and informed the office that

the defendants were not going to return the acknowledgment form.

On September 4, 1998, the plaintiffs mailed copies of the Amended Summons and Complaint to the Olmsted County Sheriff's Department for service upon the defendants. On September 8, 1998, those copies were received by the Olmsted County Sheriff's Office. On September 9, 1998, service was made upon the defendants by the Olmsted County Sheriff's Department.

ARGUMENT FOR GRANTING WRIT

The Circuits are in conflict on this important threshold question of commencement of actions in diversity cases.

The Eighth Circuit holds that actions are commenced under State law. *Larsen v. Mayo Medical Center,* 8th Cir., #99-3425 filed July 14, 2000.

The Eighth Circuit also holds that actions are commenced under Federal law. *Prasher v. Volkswagen of American, Inc.*, 480 F.2d 947 (8th Cir. 1973).

The Seventh Circuit holds that actions are commenced under Federal law. *Lewellen v. Morley,* 875 Fed.2d 118, 121 (7th Cir. 1989).

The Tenth Circuit holds that actions are commenced under Federal law. *Kitchens v. Bryan County National Bank,* 825 F.2d 248 (10th Cir. 1987).

The Second Circuit holds that actions are commenced under Federal law. *Morse v. Elmira Country Club,* 752 F.2d 35 (2nd Cir. 1984).

ARGUMENT I.

Service of Process was Timely Under Fed.R.Civ.P. 3 and 4(m).

In a diversity case, service of process is governed by the Federal Rules of Civil Procedure. *Melia v. Les Grands Chais de France,* 135 F.R.D.28, 31 (D.R.I.1991); *see also, AG-Tronic, Inc. v. Frank Paviour Ltd.,* 70 F.R.D. 393, 400 (D.Neb. 1976) (sufficiency of service of process is a matter governed solely by federal rather than state law). Federal courts have repeatedly emphasized that the Federal Rules prevail over State Rules to the extent that there may be a conflict with regard to service of process. Fed.R.Civ.P.3 provides:

A civil action is commenced by filing a complaint with the court.

Fed.R.Civ.P. 4(c)(2) provides, in part, as follows:

> (c) Service with Complaint; by Whom Made.
> (2) Service may be effected by any person who is not a party and who is at least 18 years of age.

Fed.R.Civ.P. 4(d)(2) provides, in part, as follows:

(d) Waiver of Service; Duty to Save Costs of Service; Request to Waive;

(2) An individual, corporation, or association that is subject to service under subdivision (e), (f),or (h) and that receives notice of an action in the manner provided in this paragraph has a duty to avoid unnecessary costs of serving the summons. To avoid costs, the plaintiff may notify such a defendant of the commencement of the action and request that the defendant waive service of a summons.

Fed.R.Civ.P. 4(h) provides as follows:

(h) Service Upon Corporations and Associations. Unless otherwise provided by federal law, service upon a domestic or foreign corporation or upon a partnership or other unincorporated association that is subject to suit under a common name, and from which a waiver of service has not been obtained and filed, shall be effected:

(1) in a judicial district of the United States in the manner prescribed for individuals by subdivision (e)(1), or by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process . . .

Fed.R.Civ.P. 4(m) provides as follows:

> (m) Time Limit for Service. If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service to be effected within a specified time . . .

Thus, "there is an inconsistency between state and federal law. Federal law wins these contests every time." *Lewellen v. Morley*, 875 F.2d 118, 121 (7th Cir. 1989). "To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power." *Morman v. Standard Oil Co.*, 263 F. Supp. 991, 914 (D.S.D. 1967). In *Hart v. Bates*, 897 F.Supp. 710 (E.D.N.Y.1995), the court explained:

> The Court need not, of course, be concerned about whether the filing procedures for commencing a lawsuit under Pennsylvania law need to be followed. Such matters are classic examples where federal rules must *per force* clash with state rules lest a plaintiff be required to bring his lawsuit in both the state and federal court. Thus, "the forms and mode of enforcing [a plaintiffs] right may at times, naturally enough, vary because the two judicial systems are not identic," *York [Guaranty Trust Co. v. York,* 326 U.S. 99 (1945)], 326 U.S. at 108, 65 S.Ct. at 1469, and accordingly the Federal Rule would always control in such circumstances.

Id. at 716 n.12.

In *Kitchens v. Bryan County National Bank*, 825 F.2d 248 (10th Cir. 1987), an Oklahoma statute deemed that an action commenced if service of process was effected within 60 days of filing the complaint. Service was made by certified mail, but the return receipt was not signed by the addressee, and thus there was no timely compliance with an Oklahoma statute that required a signature by the addressee. *Id.* at 254-55. Nevertheless, the court ruled that service was properly effected, stating:

> [I]f service of process was valid under federal rules of civil procedure, the cause may be deemed timely filed even if, as the Bank asserts, process was not valid under Oklahoma law.
>
> Assuming, arguendo, that process was ineffective under Oklahoma law, still there was no requirement that service be made in accordance with Oklahoma law. The Federal Rules of Civil Procedure allow several methods of affording notice to defendants, only one of which is dictated by state law. We note that service of process in the instant case complied with the spirit, if not the letter of the Fed.R.Civ.P. Rule 4. There is no question that Billy Miller, the president of the Bank, was a proper person to be served pursuant to Rule 4(d)(3). And although it appears from the record that only a copy of the summons and complaint were mailed and that the "notice and acknowledgment" and return envelope prescribed by Rule 4(c)(2)(C)(ii) were omitted,

> "the federal courts generally take a permissive attitude toward the mechanism employed for service of process when defendant actually receives notice." Wright and Miller, 4 *Federal Practice and Procedure* §1074 at 295; *Nowell v. Nowell,* 384 F.2d 951 (5th Cir. 1967), *cert. denied,* 390 U.S. 956, 88 S.Ct. 1053, 19 L.Ed.2d 1150 (1968).
>
> . . .
>
> In this case, the plaintiff made a diligent attempt to effect service on the Bank. The Bank received actual notice, but by accident or design it was technically defective. The Bank, having received actual notice of Kitchens' suit, cannot now complain that service was ineffective.

Id. at 255-56.

In the present case, Mayo relied heavily upon *Walker v. Armco Steel Corp.,* 446 U.S. 740 (1980), and subsequent cases citing *Walker*, for the proposition that there was no timely service of process in this case. However, *Walker* is distinguishable in that "there was no federal rule in conflict with or displacing state tolling statutes." *Hart v. Bates,* 897 F.Supp. at 715. In addition, *Walker* involves a state statute of limitations that specified in the statute that the action was deemed to have commenced. The Minnesota statute only provides that malpractice actions shall be commenced within two years. M.S.A. §541.07, Subd. 1. The statute does not prescribe the manner in which the action is to be commenced. Consequently, how the action is commenced remains procedural in nature. Today, however, Fed.R.Civ.P. 4(m)

expressly provides that service of a complaint is timely if it is made within 120 days after the filing of the complaint. As the *Hart* court observed:

> At the time of *Walker* there was no federal rule governing the time for service of process since the 120-day time requirement, presently contained in Fed.R.Civ.P. 4(m), was not enacted until 1983. Prior thereto, a plaintiff was only under a duty "to use due diligence in securing the issuance and service of the summons." *Sylvestri v. Warner & Swasey Co.*, 398 F.2d 598, 606 (2d Cir. 1968). The courts exercised their discretion in determining whether to dismiss a complaint because of delays in service. See 4A Charles A. Wright and Arthur. R. Miller, *Federal Practice and Procedure* §1137 (1987) ("[the due diligence standard] led courts to overlook many delays in service of a summons and complaint and to ask instead whether service still could be made").

Id. at 714 n.7.

Mayo's position would render subsection (m) of Rule 4 meaningless and ineffective. To the extent that there may be a conflict between Fed.R.Civ.P. 4(m) and Minnesota state law, the Federal Rule must prevail.

This case is closely analogous to *Prashar v. Volkswagen of America, Inc.*, 480 F.2d 947 (8th Cir. 1973). In *Prashar*, a personal injury action was filed in federal court under diversity jurisdiction. The complaint was filed one day prior to the running of the applicable South Dakota statute of

limitations. Defendants were not personally served with process until after the statute of limitations had run, and under South Dakota law an action was not "commenced" until summons was served on the defendant or delivered to the sheriff for service. *Id.* at 948. The trial court granted summary judgment to a defendant on the basis that the action was time-barred. However, on appeal the Eighth Circuit reversed, noting that South Dakota's commencement statute was not an integral part of that state's statute of limitations. *Id.* at 951. The court observed that "[a]lthough contained in the same chapter along with the statute of limitations, the South Dakota statute defining when an action is commenced does not refer to the limitations statute." *Id.* Ruling that service was timely under the Federal Rules, the *Prashar* court stated:

> [A]pplication of [federal] Rule 3 to the South Dakota statute of limitations does not alter "the mode of enforcement of state-created rights in a fashion sufficiently 'substantial' to raise the sort of equal protection problems to which the *Erie* opinion alluded." *Hanna v. Plumer, supra,* 380 U.S. at 469, 85 S.Ct. at 1143.
>
> We conclude that it is only when a state legislates a rule regarding the commencement of action as an integral part of the statute of limitations that a state policy making a mode of enforcing a state-created right intrinsically material to the right involved becomes clearly discernible and substantial. It is only then that *Erie* principles as set forth in *Ragan* must govern the litigation. *Cf. Cities Service Oil Co. v. Dunlap,* 308 U.S.208, 212, 60 S.Ct.201 ~ 84 L.Ed.196 (1939).

Id. at 953.

The same reasoning applies to the present case. The Minnesota rule upon which Mayo relies does not refer to any Minnesota statute of limitations and thus is not an integral part thereof. Under Fed.R.Civ.P. 4(m), which must prevail over any state rule to the contrary, service of process in the present case was timely. As in *Prashar,* service was timely, and plaintiffs' claims were timely asserted.

ARGUMENT II.

Fed.R.Civ.P.4 is to be Liberally Construed When a Defendant Receives Timely Notice of Suit.

Both the Minnesota Rules and the Federal Rules are liberally construed where, as in the present case, there is no dispute that a defendant has actual notice of a claim before the statute of limitations has run. "[A] fundamental principle of the rules of civil procedure is that cases should be decided on the merits rather than on technicalities, and where the intended recipient receives actual notice of the action, the rules governing such service should be liberally construed 'to avoid depriving the litigant of his day in court'." *Pederson v. Clarkson Lindley Trust,* 519 N.W.2d 234, 235 (Minn. Ct.App. 1994); *see also, Kitchens v. Bryan County National Bank,* 825 F.2d at 255-56.

In *Morse v. Elmira Country Club,* 752 F.2d 35 (2d Cir. 1984), the plaintiff filed a personal injury claim before New York's three-year statute of limitations had run, and sent a copy of the summons, complaint, and acknowledgment forms by certified mail. Defendant received the materials

before the statute of limitations had run but never returned the acknowledgment. After the statute of limitations had run, the defendant informed plaintiff that the acknowledgment would not be returned. *Id.* at 36. Distinguishing *Walker v. Armco Steel Corp.*, the *Morse* court noted that there was "no doubt that defendant received mail service and was aware of that service" before the limitations period ended. *Id.* at 39. The defendant argued that the mail service was "wholly ineffective because defendant refused to acknowledge it." *Id.* Disagreeing, and ruling that the claim was not time-barred, the *Morse* court reasoned:

> We do not agree that the rule should be read to void a received-but-unacknowledged mail service, or to substitute the requirement of personal service in lieu of an acknowledged mail service. First, the words do not say in terms that a received-but-unacknowledged mail service is ineffective, nor do they command personal service as a prerequisite to effective service by mail (if mail service is unacknowledged). What Rule 4(c) states is: "If no acknowledgment of *service* [by mail] . . . is received . . . *service* shall be made under subparagraph (A) or (B)" (emphasis added). Thus, the rule calls, not for personal service as a completion of or substitution for the mailed service, but for a *second* (personal) service should defendant ignore the rule by refusing to return the acknowledgment. It may well be that, under the literal terms of Rule 4(g), plaintiff could not make proof of service without the subsequent personal service. However, service may be effective without a return. . . .

> Above all, strong factors of justice and equity push toward reading Rule 4(c) as providing the effective mail service where, as here, the recipient actually receives the mail service but refuses to acknowledge it properly. We have been given no adequate explanation why the acknowledgment was withheld here, nor any proper basis for nullifying mail service deliberately left unacknowledged. *Certainly, the desire to harass or inconvenience plaintiff, or to delay the tolling of limitations, should not be an excuse or a reason to interpret the rule against plaintiff.* There is, in other words, nor rationale for allowing a properly served defendant deliberately and willfully to postpone the ending of limitations by simply refusing to do what the rule calls upon him to do. In short, Congress would have no ground for providing that proper and known mail service would become ineffective simply because the defendant, without reason, acted like the dog in the manger.

Id. at 39-40 (emphasis added; footnotes omitted). The court added:

> Rule 4(c)(2)(D) indicates displeasure with such unfounded refusal to acknowledge, by providing that "unless good cause is shown for not doing so the court shall order the payment of the costs of personal service by the person served if such person does not complete and return within 20 days after mailing the notice and acknowledgment of receipt of summons." This penalty, designed for deterrence, should

> not be undermined by permitting a defendant who receives mailed service timely but declines to acknowledge it thereby to acquire a statute of limitations defense. Congress would not intend to reward and punish the recalcitrant defendant in one legislative stroke.

Id. at 40. (The relevant language appears today in subsection (d)(5) of Rule 4.) *See also, Kitchens v. Bryan County National Bank,* 825 F.2d at 255-56.

In *Deshmukh v. Cook,* 630 F.Supp. 956 (S.D.N.Y. 1986), defendant Walter Cook was served by mail, but he failed to sign and return the acknowledgment of service. Echoing the reasoning of the *Morse* court, the *Deshmukh* court ruled that Cook had been properly served, stating:

> Since Cook does not deny that he received the mail service, I can only conclude that he refused to acknowledge service in order to inconvenience or harass the plaintiffs. The court of appeals made clear, however, that absent some showing of good cause, a recalcitrant defendant should not be accorded a windfall for acting like "the dog in the manger." *Id.; see, also, Gilliam v. Quinlan,* 608 F.Supp. 823, 829 n.3 (S.D.N.Y. 1985).
>
> For all of these reasons, I conclude that plaintiffs' mail service upon Walter G. Cook was valid and effective, and that the Court has personal jurisdiction over him.

Id. at 959.

Mayo relies on *Hajjiri v. First Minnesota Saving Bank,* 25 F.3d 677 (8th Cir. 1994), but in that case, the defendant refused to acknowledge service because the wrong defendants were named in the lawsuit. Moreover, the *Hajjiri* court relied almost exclusively on *Walker v. Armco Steel Corp.* and *Gulley v. Mayo Foundation,* 886 F.2d 161 (8th Cir. 1989). As noted above, in *Walker* there was no direct conflict between a federal and a state rule. 446 U.S. at 752. Furthermore, at the time *Gulley* was decided, Fed.R.Civ.P.4 expressly stated that if a defendant failed to acknowledge service then service "shall" be made in another manner. *Gulley v. Mayo Foundation,* 886 F.2d at 164. Such language no longer appears in the waiver of service provision in subsection (d) of Fed.R.Civ.P.4.

Mayo's lawyer verbally acknowledged that she personally had in her possession the Summons and Complaint and therefore, the requirements of Minn.R.Civ.P. 3.01(a) and (b) were complied with.

The case of *Gulley v. Mayo Foundation,* 886 F.2d 161 (8th Cir. 1989), must be distinguished in that here, the defendant, through Mrs. Trysla, as in *Stonewall Ins. Co. v. Horak,* 325 N.W.2d 134 (Minn. 1982) had received copies of the Summons and Complaint via certified mail and personally acknowledged that she had received them.

In the present case, since Mayo received timely actual notice of plaintiffs' claims, Fed.R.Civ.P.4 must be liberally construed in plaintiffs' favor and must prevail over any inconsistent Minnesota provision. Mayo's position, if adopted, would effectively nullify subsections (d) and (m) of Fed.R.Civ.P.4 and would reward Mayo for the "unfounded refusal to acknowledge . . . [by a] recalcitrant defendant." *Morse v. Elmira Country Club,* 752 F.2d at 40 n.9.

ARGUMENT III.

Service of Process was Proper and Timely Under Minn. R.Civ.P. 4.05.

Under Fed.R.Civ.P.4(h), service may be effected upon a corporation by delivering a copy of the summons and complaint to an officer or agent of the corporation or in the manner prescribed for individuals in subsection (e)(1) of the Rule. Liberally construed, and given that Mayo received timely actual notice in this case, the former method of service was effected by delivery of the complaint by mail. However, if this court chooses to interpret subsection 4(h) differently, then plaintiffs submit that service was properly effected under the alternative provision referenced in subsection (e)(1), i.e., pursuant to the law of the forum state.

In *Manypenny v. United States,* 125 F.R.D.497 (D.Minn. 1989), *aff'd* 948 F.2d 1057 (8th Cir. 1991),[1] individual defendants contended that service by mail was ineffective because no acknowledgment form was provided to or returned by the defendants. As in the present case, only signed certified mail return receipts were returned to the plaintiffs. 125 F.R.D. at 498. The court ruled that there was effective service under Minn.R.Civ.P.4.05. The *Manypenny* court reasoned as follows:

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[1] Although the ***Manypenny*** court declined to follow ***Morse v. Elmira Country Club,*** 125 F.R.D. at 499, it must be remembered that at the time Fed. R.Civ.P. 4(c)(2)(C)(ii) expressly stated that if a defendant refused to acknowledge service then service "shall be made" by other means. Id. at 498. As noted above, this language no longer appears in the relevant subsection of the federal Rule.

> [I]t was intended Minn.R.Civ.P.4.05 would be applied liberally, similar to the application of the parallel federal rule in *Lee v. Carlson,* 645 F.Supp. 1430, 1432 (S.D.N.Y. 1986). In *Stonewall*, as in *Lee,* the court focused upon whether there was proof of actual receipt, rather than whether the plaintiff had adhered strictly to the rule governing personal service. Because the individual defendants in this case signed and returned the certified mail return receipts and have in other ways admitted actual receipt of the Summons and Complaint, under the policy set forth in *Stonewall,* service was effective under Minn.R.Civ.P.4.05 and, therefore, under Fed.R.Civ.P. 4(c)(2)(C)(i).

125 F.R.D. at 500; *accord Blaeser & Johnson, P.A. v. Kjellberg,* 483 N.W.2d 98, 101 (Minn. Ct. App. 1992).

As in *Manypenny,* it is clear that Mayo received timely actual notice of plaintiffs' claims. There was substantial compliance with Fed.R.Civ.P.4 and/or Minn. R.Civ.P.4.05, and thus Mayo's motion for summary judgment should have been denied; or the 8th Circuit should have reversed and remanded.

CONCLUSION

A Petition for Writ of Certiorari should be granted; otherwise the courts in this country will suffer the confusion which will ultimately arise as to which laws apply to commencement of actions in diversity cases.

JOHANNSON, RUST, FAGERLUND, YON & STOCK

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Filed July 14, 2000]

No. 99-3425

Patricia L. Larsen; Donald Larsen, *Appellants,*

v.

Mayo Medical Center; The Mayo Foundation; Mayo Clinic, *Appellees.*

Appeal from the United States District Court for the District of Minnesota.

Before HANSEN and HEANEY, Circuit Judges, and MILLS[1], District Judge.

[1] The Honorable Richard Mills, United States District Judge, for the Central District of Illinois, sitting by designation.

OPINION

HEANEY, Circuit Judge.

Patricia Larsen contracted an illness from medication administered to her during her hospitalization at the Mayo Medical Center ("Mayo"). She sued Mayo for medical malpractice. Mayo moved for summary judgment on the basis that Larsen's claim was time-barred. The district court granted the motion, and Larsen appeals. Because Larsen failed to serve Mayo within the two-year statute of limitations, we affirm.

FACTS

Larsen was hospitalized at Mayo from June 27, 1996 to July 6, 1996. She was diagnosed with bacterial endocarditis, and as part of her treatment, she was administered and prescribed the antibiotic Gentamicin.

On July 19, 1996, Larsen returned to Mayo, complaining of dizziness and nausea, and again was hospitalized. She was diagnosed with Gentamicin vestibular ototoxicity, an illness solely caused by taking the antibiotic. During her hospitalization, Mayo personnel told Larsen that she might never completely recover from the illness. They further discussed the nature of the illness, how it would affect her, and the option of undergoing vestibular rehabilitation. Larsen was discharged from Mayo on July 24, 1996. She returned on September 5, 1996 and September 13, 1996 for follow-up examinations.

Larsen filed her complaint against Mayo on May 29, 1998 wherein she alleged medical malpractice. On June 1, 1998, Larsen attempted to serve Mayo by mailing a copy of the summons and complaint and enclosing an Acknowledgment of Service form for Mayo to return. Mayo received the materials two days later, but did not sign and return the acknowledgment form. On June 15, 1998, Larsen's counsel contacted Mayo's in-house counsel, who informed him that Mayo would not admit service or assist Larsen in any way in suing his client.

On June 22, 1998, Larsen filed an amended complaint, which she again mailed to Mayo with an Acknowledgment of Service form. Mayo did not return the form, and on September 3, 1998, Larsen's counsel again contacted Mayo's counsel, who again told him that Mayo would not execute the form.

On September 4, 1998, Larsen mailed copies of the amended summons and complaint to the Olmstead County Sheriff's Department. The Sheriff's Department received the materials on September 8, 1998 and served Mayo the following day.

Mayo moved for summary judgment on the ground that Larsen's claim was time-barred. The district court granted the motion, noting that the statute of limitations for medical malpractice claims in Minnesota was two years.[2] It

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[2] The Minnesota Legislature extended the statute of limitations for medical malpractice actions commenced after August 1, 1999 from two to four years. See Minn. Stat. § 541.076 (2000). Because Larsen filed suit in 1998, the two-year statute of

further held that although a medical malpractice cause of action generally accrues when a physician's treatment of the condition ends, this case falls into the "single act" exception because: (1) the alleged malpractice terminated on July 13, 1996 when Larsen was administered and prescribed Gentamicin; (2) the malpractice became irrevocable on July 19, 1996, when Larsen was diagnosed with vestibular ototoxicity; and (3) Larsen was fully aware by July 23, 1996 of the facts upon which her claim is based.

Having determined that the single act exception applies, the district court considered whether service was timely. It concluded that service was not effective until September 8, 1998, the date the Olmstead County Sheriff's Department received the summons and complaint for service on Mayo, and thus that Larsen's claims were time-barred. Larsen appeals the district court's grant of Mayo's summary judgment motion.

DISCUSSION

We review the district court's summary judgment grant de novo. See Mueller v. Tinkham, 162 F.3d 999, 1002 (8th Cir. 1998). Summary judgment is proper where, viewing the evidence in the light most favorable to the non-moving party, there are no genuine issues of material fact in dispute.

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limitations applies. We note, however, that after August 1, 1999 Larsen filed another suit against Mayo alleging the same facts presented here. That action is now pending before the district court. Our holding is limited solely to this case and does not decide the issues pending in the second action.

See Fed. R. Civ. P. 56(c); Enterprise Bank v. Magna Bank, 92 F.3d 743, 747 (8th Cir. 1996). However, the non-moving party bears the burden of presenting specific facts that create a genuine issue for trial. See Krenik v. County of Le Sueur, 47 F.3d 953, 957 (8th Cir. 1995).

I. Accrual Date

Federal jurisdiction in this case is based on diversity. Thus, Minnesota's substantive law, including its statute of limitations, applies. See Erie R. Co. v. Tompkins, 304 U.S. 64 (1938); Guaranty Trust Co. v. York, 326 U.S. 99, 110 (1945). At the time of filing, Minnesota law required that medical malpractice actions be brought within two years after the cause of action accrues. See Minn. Stat. § 541.07(1) (1988). Although a cause of action generally accrues on the date the medical treatment ceases, an exception exists where the negligence is considered a "single act." See Haberle v. Buchwald, 480 N.W.2d 351, 354-55 (Minn. Ct. App. 1992). The single act exception applies if: (1) there is a single act of negligence; (2) the act is completed at a precise time; (3) no continued course of treatment can either cure or relieve the harm resulting from the act; and (4) the plaintiff is actually aware of the facts upon which the claim is based. See id. (citing Crenshaw v. St. Paul Ramsey Med. Ctr., 379 N.W.2d 720, 721 (Minn. Ct. App. 1986)).

Larsen concedes that the first two elements are satisfied. She first argues, however, that a reasonable jury could find that the vestibular ototoxicity could be cured or relieved. Mayo, on the other hand, claims that no cure exists, and that Larsen's only option was to attend vestibular

rehabilitation and hope that her body could compensate for the loss of function caused by the illness.

The undisputed evidence in the record indicates that vestibular ototoxicity is incurable and cannot be relieved by treatment. During Larsen's hospitalization, Mayo physicians discussed with her the fact that "she may not completely recover function." (J.A. at 102.) The record also shows that Larsen's symptoms could not be relieved by treatment, and that any symptomatic changes could occur only if her body compensated for the loss of function. Thus, the district court correctly concluded that the third element of the single act exception was met.

Larsen also argues that a reasonable jury could find that she did not know the facts upon which her claim is based. However, she does not dispute that on July 19, 1996 hospital personnel "discussed frankly" with her that the Gentamicin caused the vestibular ototoxicity, and that "she may not completely recover." (Id.) Moreover, Larsen does not deny that on July 23, 1996, Mayo personnel discussed with her and her husband the nature of the illness, her prognosis, and the option of undergoing vestibular rehabilitation. Larsen was discharged on July 24, 1996. By that date, she knew she had contracted an illness, that the illness was caused by the prescribed antibiotic, and the effects of the illness. Hence, Larsen knew the facts upon which her medical malpractice claim is based.

Because all four elements of the single act exception were met as of July 24, 1996, the limitations period for Larsen's medical malpractice claim began running on that date.

II. Timeliness of Service

Larsen contends that service was timely even if the limitations period began to run on July 24, 1996. She argues that under the Federal Rules of Civil Procedure a civil action is commenced by filing a complaint with the court, see Fed. R. Civ. P. 3, and that since she filed her complaint on May 29, 1998, her action is timely. This argument fails to recognize the case law of both the Supreme Court and our court.

Larsen correctly points out that the Federal Rules of Civil Procedure determine the date from which various timing requirements begin to run. They do not, however, affect the commencement of a lawsuit. See Walker v. Armco Steel Corp., 446 U.S. 740, 750-52 (1980); Walker v. Thielen Motors, Inc., 916 F.2d 450, 451 (8th Cir. 1990). Rather, state commencement rules apply because they are "part and parcel of the statute of limitations." Walker, 446 U.S. at 752. Accordingly, Minnesota's commencement rule, rather than the federal commencement rule, governs in this case.

Under Minnesota's Rules of Civil Procedure, a civil action is commenced:

> (a) when the summons is served upon that defendant, or
> (b) at the date of acknowledgment of service if service is made by mail, or
> (c) when the summons is delivered to the sheriff in the county where the defendant resides for service. . . .

Minn. R. Civ. P. 3.01.

Although Minnesota law controls the commencement of a lawsuit, service of process in federal diversity actions is procedural, and therefore, governed by the Federal Rules. See Hajjiri v. First Minn. Sav. Bank F.S.B., 25 F.3d 677, 678 (8th Cir. 1994). Under the Federal Rules, a plaintiff may, among other things, notify the defendant of the commencement of the action and request that the defendant waive service of the summons. See Fed. R. Civ. P. 4(d)(2). If the defendant returns the waiver and the plaintiff files the waiver with the court, "the action shall proceed . . . as if a summons and complaint had been served at the time of filing the waiver." Id. at 4(d)(4). However, if the defendant does not waive service, service has not been effected. See Gulley v. Mayo Found., 886 F.2d 161, 165 ("[T]he provisions of [Rule 4] are to be strictly complied with . . . therefore, if the acknowledgment form is not returned, the formal requirements of mail service are not met and personal service must be obtained." (internal quotation marks omitted)); Alholm v. American Steamship Co., 144 F.3d 1172, 1176 (8th Cir. 1998) (noting mail service ineffective when acknowledgment form not returned).

In this case, Larsen twice mailed copies of the summons and complaint to Mayo, first on June 1, 1998 and again on June 22, 1998. Both times she enclosed an acknowledgment form, and both times, Mayo refused to execute the form. Because Mayo did not waive service by returning the acknowledgment form, the requirements for service by mail were not met. Mayo then was not served until the Olmstead County Sheriff's Department received a copy of

the summons and complaint on September 8, 1998, more than a month after the two-year limitations period expired.

Larsen makes two alternative arguments, both of which are without merit. She claims that service was effective under Fed. R. Civ. P. 4(m), which states:

> Time Limit for Service. If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service to be effected within a specified time. . . .

Larsen argues that Rule 4(m) conflicts with Minnesota's commencement rule, and thus, that the federal rule, not the state rule, governs. See Lewellen v. Morley, 875 F.2d 118, 121 (7th Cir. 1989) (holding where federal and state rules conflict, federal rule applies).

First, Fed. R. Civ. P. 4(m) is irrelevant. The rule is only a time restriction that requires the summons and complaint to be served within 120 days of the filing of the complaint. It does not address how or when a lawsuit is properly commenced.

Second, even if relevant, Fed. R. Civ. P. 4(m) does not conflict with Minnesota's commencement rule. In Walker, the Supreme Court interpreted a state commencement rule identical to that of Minnesota and held that the state rule did not conflict with the Federal Rules. See 446 U.S. at 752

("[Each] can exist side by side, therefore, each controlling its own intended sphere of coverage without conflict."). Because the rules do not conflict, Minn. R. Civ. P. 3.01 governs the commencement of Larsen's lawsuit.

Finally, Larsen argues that service was effective under Fed. R. Civ. P. 4(h), which provides for service on a corporation by delivering a copy of the summons and complaint to an officer, manager or authorized agent of the corporation. This argument also is meritless because the summons and complaint were mailed and not personally served on anyone during the limitations period. Further, they were not even mailed to an officer, manager or authorized agent of Mayo Clinic, but addressed to "Medical/Legal Department, Mayo Clinic." (J.A. at 63.) Thus, service was ineffective under Rule 4(h).

CONCLUSION

The statute of limitations began to run in this case no later than July 24, 1996. The lawsuit was not commenced until September 8, 1998, over a month after the limitations period expired. Thus, the district court correctly concluded that Larsen's medical malpractice claim against Mayo is time-barred, and we affirm its decision to grant summary judgment.

A true copy.

Attest.

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

[Filed August 12, 1999]

No. 98-1414 (DWF/AJB)

Patricia L. Larsen, and Donald Larsen, *Plaintiffs,*	)
v.	)
Mayo Foundation, Mayo Clinic, and Mayo Medical Center, *Defendants.*	)

MEMORANDUM OPINION AND ORDER

Introduction

This medical malpractice action arises out of the allegedly improper prescription and administering of the antibiotic Gentamicin, which allegedly caused plaintiff Patricia L. Larsen to suffer severe, permanent, and painful injury to her vestibular system. The Plaintiffs allege that Defendants Mayo Foundation, Mayo Clinic, and Mayo Medical Center (collectively "Mayo") deviated from the

accepted standard of care in several respects, particularly in that the dosage of Gentamicin was excessive, and Mayo's physicians failed to adequately inform and warn the Plaintiffs in connection with Ms. Larsen's treatment.

The matter is currently before the Court on the Defendants' Motion for Summary Judgment. The Defendants assert that the Plaintiffs' cause of action is barred by the applicable statute of limitations. Because the allegedly negligent course of conduct was completed more than two years before the Plaintiffs properly commenced the present lawsuit, the Defendants' motion must be granted, and the case now before this Court must be dismissed with prejudice.

Background

The facts are not in dispute between the parties as the facts relate to the dates of Ms. Larsen's hospitalization and treatment with the drug Gentamicin (Pl. Memo. in Opp., p. 1.)

In June of 1996, after experiencing various symptoms, including pain in her left heel, weakness and achiness in her right arm, and night sweats and chills for several months, Ms. Larsen sought treatment from Mayo. (Affidavit of Trudi Noel Trysla, Ex. A.) Ms. Larsen was hospitalized at St. Mary's Hospital of the Mayo Clinic on June 27, 1996. (Trysla Aff., Ex. B.)

Ms. Larsen was diagnosed as suffering from bacterial endocarditis. (Trysla Aff., Ex. B.) Mayo prescribed Gentamicin, antibiotic. (Trysla Aff., Ex. B.) The drug was administered intravenously during Ms. Larsen's

hospitalization, from June 27, 1996, through July 5, 1996, the date of Ms. Larsen's discharge from Mayo. (Trysla Aff., Ex. B.) After Ms. Larsen's discharge, Mayo prescribed 500 milligrams of Gentamicin to be administered daily. (Trysla Aff., Ex. B.) July 13, 1996, was the last date for which Mayo prescribed Gentamicin for Ms. Larsen. (Trysla Aff., Ex. B.)

On July 19, 1996, Ms. Larsen returned to St. Mary's Hospital of the Mayo Clinic, after suffering dizziness and nausea for four days. (Trysla Aff., Ex. D.) Ms. Larsen was hospitalized and diagnosed with gentamicin vestibular ototoxicity, a condition affecting Ms. Larsen's ability to maintain her balance. (Trysla Aff., Exs. D, H.) According to the Hospital Notes for July 19, 1996, a person from Mayo "[d]iscussed frankly" with Ms. Larson that "she may not completely recover function," but that hopefully her body would compensate for the lost function and her balance would improve. (Trysla Aff., Ex. E.) In addition, according to the Rehabilitation Record dated July 23, 1996, a person from Mayo had a "long discussion [with Ms. and Mr. Larsen] as to what has happened, what they can expect, and what [vestibular rehabilitation] has to offer." (Trysla Aff., Ex. F.)

Ms. Larsen was discharged from Mayo on July 24, 1996. (Trysla Aff., Ex. D.) She returned to Mayo on September 5, 1996, and September 13, 1996, for follow-up treatment. (Trysla Aff, Exs. G, H.)

On May 29, 1998, the Plaintiffs filed the present action. (Court Doc. No. 1.) On June 1, 1998, the Plaintiffs mailed a copy of the Summons and Complaint to Mayo. (Affidavit of Kenneth F. Johannson in Opp. to Def. Motion,

p. 2; Trysla Aff. at ¶ 2.) The Plaintiffs enclosed an Acknowledgment of Service form for the Defendants' execution. (Trysla Aff. at ¶ 2.) The Defendants chose not to sign and return the acknowledgment form. (Trysla Aff. at ¶ 2.) On June 15, 1998, in-house counsel for Mayo spoke with Plaintiffs' counsel by telephone. (Johannson Aff. at p. 4; Trysla Aff at ¶ 3.) Counsel for Mayo informed Plaintiffs' counsel that Mayo was not going to admit service and that counsel for Mayo was not going to assist the Plaintiffs in suing Mayo in any way. (Johannson Aff. at pp. 4-5; Trysla Aff. at ¶ 3.)

On June 22, 1998, the Plaintiffs filed their Amended Complaint. (Court Doc. No. 3.) In July of 1998, Mayo received the Amended Summons and Complaint from the Plaintiffs by mail, again with an Acknowledgment of Service form enclosed for the Defendants' execution. (Trysla Aff. at ¶ 4.) The Defendants again chose not to sign and return the acknowledgment form. (Trysla Aff. at ¶ 4.) On September 3, 1998, counsel for the Plaintiffs called in-house counsel for Mayo. (Johannson Aff. at p. 6; Trysla Aff. at ¶ 5.) In returning the call, in-house counsel for Mayo spoke with Plaintiffs' counsel's assistant, and informed the office that the Defendants were not going to return the acknowledgment form. (Johannson Aff. at p. 6; Trysla Aff. at ¶ 5.)

On September 4, 1998, the Plaintiffs mailed copies of the Amended Summons and Complaint to the Olmsted County Sheriff's Department for service upon the Defendants. (Johannson Aff., p. 6.) On September 8, 1998, those copies were received by the Olmsted County Sheriff's Office. (Johannson Aff. at p. 6.) On September 9, 1998, service was

made upon the Defendants by the Olmsted County Sheriff's Department. (Johannson Aff. at p. 6.)

As set forth in their Amended Complaint, the Plaintiffs allege that the physicians of the Defendants deviated from accepted standards of medical care in the following manner: (1) the Gentamicin dosage administered to Ms. Larsen was excessive, and the excessive dosage was a direct cause of Ms. Larsen's injury to her vestibular system; (2) the physicians of the Defendants failed to inform the Plaintiffs of the risks of Gentamicin; (3) the physicians of the Defendants failed to inform the Plaintiffs of alternative forms of antibiotic therapy; (4) the physicians of the Defendants failed to adequately monitor the levels of Gentamicin in Ms. Larsen's system; and (5) the physicians of the Defendants failed to test Ms. Larsen to determine her level of functioning prior to her treatment with Gentamicin. (Amended Complaint at ¶¶ V-X.) The Plaintiffs allege that the above alleged departures from accepted standards of medical care directly caused, the Plaintiffs' injuries. (Amended Complaint at ¶ XI.)

As set forth in the Amended Complaint, all allegations of medical malpractice pertain to conduct that allegedly occurred on or before July 13, 1996, the last date for which Mayo prescribed Gentamicin for Ms. Larsen. The Amended Complaint contains no allegations of malpractice in regards to the Defendants' care after Ms. Larsen stopped taking Gentamicin.

Discussion

A. Standard of Review

Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Enterprise Bank v. Magna Bank, 92 F.3d 743, 747 (8th Cir. 1996). The court must view the evidence and the inferences which may be reasonably drawn from the evidence in the light most favorable to the nonmoving party. Enterprise Bank, 92 F.3d at 747. However, as the Supreme Court has stated, "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to 'secure the just, speedy, and inexpensive determination of every action.'" Fed. R. Civ. P. 1. Celotex Corp. v. Catrett, 477 U.S. 317, 327, 106 S.Ct. 2548, 2555, 91 L.Ed.2d 265 (1986).

The moving party bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Enterprise Bank, 92 F.3d at 747. The nonmoving party must then demonstrate the existence of specific facts in the record which create a genuine issue for trial. Krenik v. County of Le Sueur, 47 F.3d 953, 957 (8th Cir. 1995). A party opposing a properly supported motion for summary, judgment may not rest upon mere allegations or denial, but must set forth specific facts showing that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S.Ct. 2505, 2514, 91 L. Ed. 2d 202 (1986); Krenik, 47 F.3d at 957.

B. Statute of Limitations

The applicable statute of limitations for medical malpractice in Minnesota is two years. Minn. Stat. § 541.07, subd. 1. A malpractice action accrues when the alleged negligence and resulting damage occur. Alholm v. American Steamship Co., 144 F.3d 1172, 1177 (8th Cir. 1998), citing Offerdahl v. University of Minnesota Hosp. and Clinics, 426 N.W.2d 425, 428-29 (Minn. 1988).

Under Minnesota law, a cause of faction for medical malpractice generally accrues when the physician's treatment of the particular condition at issue ends. Gulley v. Mayo Foundation, 886 F.2d 161, 163 (8th Cir. 1989), citing Grondahl v. Bulluck, 318 N.W.2d 240, 243 (Minn. 1982). However, the Minnesota Supreme Court has adopted the "single act exception" to the termination of treatment rule. Gulley, 886 F.2d at 162. Under the exception, if the alleged malpractice consists of a single act, the statute of limitations runs from the time of that act, even though the doctor-patient relationship continues. Gulley, 886 F.2d at 163, citing Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686, 694 (Minn. 1980). Otherwise stated, where the malpractice occurs in a single act, subsequent time and effort merely to remedy or cure that act will not toll the running of the statute. Alholm, 144 F.3d at 1177, quoting Galley, 886 F.2d at 163.

The "single act exception" applies when three requirements are met: (1) the alleged malpractice consists of a single act which is complete at a precise time; (2) which no continued course of treatment can cure or relieve; and (3) where the plaintiff is actually aware of the facts upon which

the claim is based. Gulley, 886 F.2d at 163, citing Swang v. Hauser, 288 Minn. 306, 180 N.W.2d 187, 190 (1970).

However, the real meaning of the first requirement is not that the malpractice truly consist of a "single act," but rather that the malpractice must terminate at a distinct and determinable point of time:

> [T]he phrase "a single act of malpractice" is a misleading title for the legal concept it identifies. The rule applies not to conduct that starts and ends in a moment, but rather to a course of malpractice which terminates at a specific point in time.
>
> . . .
>
> It is unfortunate that this exception acquired the name "single act" when what was intended is quite a different matter, termination of the episode of malpractice at an identifiable point in time.

Haberle v. Buchwald, 480 N.W.2d 351, 356-57 (Minn. Ct. App, 1992), rev. denied, Aug. 4, 1992.

In the present matter, the Amended Complaint itself establishes that the alleged malpractice terminated at a specific and identifiable point in time. In their opposition to the present summary judgment motion, the Plaintiffs argue that "[r]easonable jurors could find that Mayo's negligence continued so long as Mayo's personnel continued efforts to treat any condition for which she sought treatment," and therefore, "[r]easonable jurors could find that up until September 13, 1996 [the last date on which Ms. Larsen

obtained follow-up treatment at Mayo], Mayo continued to negligently treat Ms. Larsen." (Pl. Memo. in Opp., p. 3.) However, the Amended Complaint contains no such allegations.

Rather, the Amended Complaint only contains allegations relating to Mayo's prescription and administering of Gentamicin. Specifically, the Plaintiffs allege that the dosage was excessive, that the Defendants failed to warn the Plaintiffs of the risks of Gentamicin and failed to inform the Plaintiffs of alternative methods of treatment, and that the Defendants failed to properly monitor the Gentamicin levels and failed to test Ms. Larsen's functioning prior to treatment. The Amended Complaint contains no allegations of malpractice relating to any care that Ms. Larsen received after her last dose of Gentamicin, on July 13, 1996.

Therefore, because the allegations contained in the Amended Complaint establish that the alleged malpractice terminated at a specific and identifiable point in time, the first requirement for application of the single act exception is satisfied. See Gulley, 886 F.2d at 163 (single act exception applied because, despite plaintiff's subsequent visits to the defendant clinic, all alleged malpractice occurred at or prior to the performance of a surgery on a specific date); see also Haberle, 480 N.W.2d at 354, 357 (single act exception applied where it was undisputed that the plaintiff's claims of negligence related solely to a specific period of time during her care, and the plaintiff did not allege any negligence regarding care that occurred after that period, even though she was still being treated by the defendant).

As its second element, the single act exception requires that no continued course of treatment can cure or relieve the alleged act of negligence. Gulley, 886 F.2d at 163, citing Swang, 180 N.W.2d at 190. This second element has alternatively been phrased as a requirement that "all subsequent treatment was independent of the alleged malpractice and in no way had the effect of concealing any prior defective treatment or any injury arising from it." Zagaros v. Erickson, 558 N.W.2d 516, 522 (Minn. Ct. App. 1997), rev. denied, April 17, 1997, citing Haberle, 480 N.W.2d at 356. The focus of the requirement is on the irrevocability of the fact that the alleged malpractice occurred. See Haberle, 480 N.W.2d at 356 (second requirement satisfied because "additional admissions and additional surgeries could not change that fact that most of appellant's stomach had been removed"); see also Offerdahl 426 N.W.2d at 428-29 (malpractice claim barred by statute of limitations because "the event of the alleged, malpractice irrevocably occurred" on the date of surgery).

In the present matter, Ms. Larsen returned to Mayo on July 19, 1996, suffering dizziness and nausea. She was hospitalized and diagnosed with gentamicin vestibular ototoxicity, a condition affecting Ms. Larsen's ability to maintain her balance. The Plaintiffs allege that the damage to Ms. Larsen's vestibular system was caused by Mayo's malpractice in negligently prescribing and administering excessive doses of Gentamicin. Ms. Larsen was discharged on July 24, 1996; subsequent visits to Mayo in September involved follow-up care and rehabilitation.

The second requirement of irrevocability was therefore satisfied in July of 1996, when Ms. Larsen was hospitalized

and diagnosed with vestibular ototoxicity, allegedly caused by Mayo's negligent prescription and administering of Gentamicin. At that point, the fact of the Defendants' alleged malpractice became irrevocable; no subsequent treatment could change the fact that Ms. Larsen had developed vestibular ototoxicity. In addition, the subsequent vestibular rehabilitation and follow-up treatment in September was independent of the alleged malpractice in the prescription and administration of Gentamicin, and the subsequent visits to Mayo did not have the effect of concealing any prior defective treatment or any injury arising from it.

Finally, the third element requires that the plaintiff "knew or should have known the facts upon which her claim could be based." Zagaros, 558 N.W.2d at 522, citing Haberle, 480 N.W.2d at 355-56. The "actual awareness" of the third requirement is therefore again misleading. See Haberle, 480 N.W.2d at 356 ("[w]hen determining whether a plaintiff was 'actually aware' of the facts upon which a claim is based, the question is whether the plaintiff actually knew or should have known").

A plaintiff's ignorance of the existence of a cause of action does not render the single act exception inapplicable. Gulley, 886 F.2d at 163, citing Goellner v. Butler, 836 F.2d 426, 430-31 (8th Cir. 1988). In the malpractice context, the Minnesota courts have expressly rejected the "discovery rule"; in the absence of fraud, ignorance of the existence of a cause of action does not toll the statute of limitations, nor is it necessary that the ultimate damage be known or predictable, so long as some damage has occurred. Gulley, 886 F.2d at 163, quoting Goellner, 836 F.2d at 431. "Accrual of a cause of action need not wait until a plaintiff in fact has sought an

expert opinion stating there was a departure from accepted medical practice." Haberle, 480 N.W.2d at 356.

In the present matter, after suffering dizziness and nausea for days, Ms. Larsen was readmitted to Mayo on July 19, 1996, and was diagnosed with gentamicin vestibular ototoxicity. The evidence in the record states that, on July 19, 1996, a person from Mayo "discussed frankly" with Ms. Larsen that "she may not completely recover function." In addition, a person from Mayo had a "long discussion" with the Plaintiffs "as to what has happened, what they can expect, and what [vestibular rehabilitation] has to offer," according to a hospital record dated July 23, 1996.

The Plaintiffs have not submitted any evidence of their own to contradict this evidence in the record. There is therefore no question of fact as to the Plaintiffs' knowledge of the facts upon which their claim is based, and that third and final requirement for application of the single act exception is satisfied.

Consequently, the single act exception applies to the Plaintiffs' claim of medical malpractice. First, the alleged malpractice terminated at a specific and identifiable point in time, specifically, July 13, 1996, the last date for which Ms. Larsen was prescribed, and administered Gentamicin. Secondly, the fact of the Defendants' alleged malpractice became irrevocable on July 19, 1996, the date upon which Ms. Larsen was hospitalized and diagnosed with vestibular ototoxicity. Third and finally, the Plaintiffs became aware of the facts upon which their claim is based by July 19 and 23, 1996, the dates upon which the record states that individuals from Mayo discussed Ms. Larsen's condition with the

Plaintiffs. Therefore, the Plaintiffs' medical malpractice claim accrued, at the latest, by July 23, 1996.

C. Commencement of the Action

Minnesota commencement rules apply to this medical malpractice action in diversity. Alholm, 144 F.3d at 1176; Gulley, 886 F.2d at 164. Under Minnesota procedural rules, an action is commenced:

> (a) when the summons is served upon that defendant, or
> (b) at the date of acknowledgement of service if service is made by mail, or
> (c) when the summons is delivered to the sheriff in the county where the defendant resides for service; . . .

Minn. R. Civ. P. 3.01.

The federal rules then govern service of process. Gulley, 886 F.2d at 164. Specifically, Rule 4 of the Federal Rules of Civil Procedure provides that a plaintiff may notify a defendant of the commencement of an action and request that the defendant waive service of a summons. Fed. R. Civ. P. 4(d)(2).

In the present matter, the Plaintiffs twice mailed copies of the summons to the Defendants' in-house counsel, first on June 1, 1998, and again in July of 1998, both times with an acknowledgment form enclosed. On both occasions, in-house counsel for the Defendants chose not to acknowledge service. In fact, on June 15, 1998, counsel for both parties spoke by

telephone, and counsel for the Defendants informed Plaintiffs' counsel that Mayo was not going to admit service and that counsel for Mayo was not going to assist the Plaintiffs in suing Mayo in any way.

The Defendants refused the Plaintiffs' requests to waive service; therefore, the requirements of the procedural rule were not satisfied and the Plaintiffs' attempts at service by mail were not effective. See Gulley, 886 F.2d at 164-65 (signed return receipt indicating receipt of summons and complaint by mail by the defendant held insufficient to satisfy requirements of acknowledgment of service by mail; "if the acknowledgment form is not returned, the formal requirements of mail service are not met and personal service must be obtained").

In the alternative, the Plaintiffs argue that the commencement rules were satisfied in that the Defendants received actual notice, or instead, that the method of service was effective for service upon a corporation under Fed. R. Civ. P. 4(h). (Pl. Memo. in Opp., pp. 9-14.) However, that same argument was rejected by the Eighth Circuit in Alholm in 1998. See Alholm, 144 F.3d at 1175, 1176 (where employee of the defendant clinic signed the certified mail receipt, but on advice of counsel the acknowledgment forms were not returned, and where the plaintiff argued that the defendants received actual notice, or in the alternative, that service upon a corporation was effected under Fed. R. Civ. P. 4(h), the Eighth Circuit held that the attempts at service did not comport with the applicable rules).

Instead, service upon Mayo was not effective until September 8, 1998, the date upon which the summons was

delivered to the Olmsted County Sheriff's Department for service upon the Defendants, pursuant to Minn. R. Civ. P. 3.01(c).[1] However, this date occurred more than two years after the Plaintiffs' cause of action accrued. Therefore, the Plaintiffs' cause of action is barred by the applicable two-year statute of limitations.

Conclusion

Because the Plaintiffs cannot maintain their cause of action under the two-year statute of limitations that currently applies to this case, the Plaintiffs' lawsuit must be dismissed with prejudice.

However, on August 1, 1999, the statute of limitations in question was amended. Minn. Stat. § 541.076 now provides that medical malpractice lawsuits must be commenced within four years from the date the cause of action accrued. This new four-year statute of limitations applies to actions commenced on or after August 1, 1999. It would therefore appear that causes of action that were between two and four years old immediately prior to August 1, 1999, and that were therefore invalid under the then two-year statute of limitations, may have suddenly been revived under the new four-year statute of limitations.

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[1] The Plaintiffs additionally requested that the Court extend the time allowed for service of process. (Pl. Memo. in Opp., pp. 14-15.) As the Court finds that service of process should be properly effected pursuant to the applicable rules of procedure, the Court declines to excuse the rules and/or extend the deadline.

Nevertheless, the new four-year statute of limitations does not apply to the present lawsuit. The issue of whether the Plaintiffs' cause of action could now survive under the new four-year statute of limitations, or whether their cause of action would somehow be prejudiced by the dismissal of this lawsuit, is not before this Court. The Court therefore does not need to reach the issue of whether a plaintiff who has sat on his or her rights completely for the past four years should somehow be in a better position under the new statute of limitations than the present Plaintiffs, who attempted to pursue their cause of action but narrowly missed the two-year deadline.

For the reasons stated, IT IS HEREBY ORDERED:

1. The Defendants' Motion for Summary Judgment (Doc. No. 17) is **GRANTED**.

2. The Amended Complaint is **DISMISSED WITH PREJUDICE.**

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: August 12, 1999

/s/_____
DONOVAN W. FRANK
Judge of United States District Court

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[August 17, 2000]

No. 99-3425MNMI

Patricia L. Larsen, Donald Larsen, *Appellants,*

v.

Mayo Medical Center, The Mayo Foundation, Mayo Clinic, *Appellees.*

Appeal from the United States District Court for the District of Minnesota.

The petition for rehearing by the panel filed by appellants is denied.

(5193-010199)

August 17, 2000

Order Entered at the Direction of the Court:

/s/_____
Clerk, Court of Appeals, Eighth Circuit

APPENDIX D

MINNESOTA RULES OF CIVIL PROCEDURE

Rule 3. Commencement of the action; Service of the Complaint

Rule 3.01. Commencement of the Action

A civil action is commenced against each defendant:

(a) when the summons is served upon that defendant, or

* * *

Rule 4.03. Personal service

Service of summons within the state shall be as follows:

* * *

(c) **Upon a Corporation**. Upon a domestic or foreign corporation, by delivering a copy to an officer or managing agent, or to any other agent authorized expressly or impliedly or designated by statute to receive service of summons, and if the agent is one authorized or designated under statute to receive service an statutory provision for the manner of such service shall be complied with. . . .

* * *

Rule 4.05 Service by Mail

In any action service may be made by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to Form 22 and a return envelope, postage prepaid, addressed to the sender. If acknowledgment of service under this rule is not received by the sender within the time defendant is required by these rules to serve an answer, service shall be ineffectual.

APPENDIX E

FEDERAL RULES OF CIVIL PROCEDURE

Rule 3. Commencement of Action

A civil action is commenced by filing a complaint with the court.

Rule 4. Summons

* * *

(d) Waiver of Service: Duty to Save Costs of Service: Request to Waive.

* * *

(2) An individual, corporation, or association that is subject to service under subdivision (e), (f), or (h) and that receives notice of an action in the manner provided in this paragraph has a duty to avoid unnecessary costs of serving the summons. To avoid costs, the plaintiff may notify such a defendant of the commencement of the action and request that the defendant waive service of a summons. The notice and request

(A) shall be in writing and shall be addressed directly to the defendant, if an individual, or else to an officer or managing or general agent (or other agent authorized by appointment or law to receive service under subdivision (h);

(B) shall be dispatched through first-class mail or other reliable means;

(C) shall be accompanied by a copy of the complaint and shall identify the court in which it has been filed;

(D) shall inform the defendant, by means of a text prescribed in an official form promulgated pursuant to Rule 84, of the consequences of compliance and of a failure to comply with the request;

(E) shall set forth the date on which the request is sent;

(F) shall allow the defendant a reasonable time to return the waiver, which shall be at least 30 days from the date on which the request is sent, or 60 days from the date if the defendant is addressed outside any judicial district of the United States; and

(G) shall provide the defendant with an extra copy of the notice and request, as well as a prepaid means of compliance in writing.

* * *

(h) **Service Upon Corporations and Associations.** Unless otherwise provided by federal law, service upon a domestic or foreign corporation or upon a partnership or other unincorporated association that is subject to suit under a common name, and from which a waiver of service has not been obtained and filed, shall be effected:

(1) in a judicial district of the United States in the manner prescribed for individuals by subdivison (e)(1), or by delivering a copy of the summons and of

the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant, or . . .

* * *

(m) Time Limit for Service. If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own innitiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; . . .